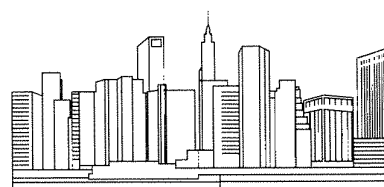
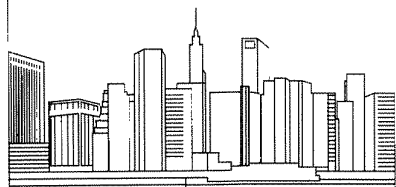


HAWAII CONDOMINIUM BULLETIN



VOLUME 4 NO. 1

FALL/WINTER 1994

Funded through the Condominium Management Education Fund, Hawaii Real Estate Commission, State of Hawaii

Proposed Reserve Rules Update

On September 6, 1994, a public hearing was held on the proposed reserve rules. Sixteen individuals attended the hearing. Eight persons submitted oral or written testimony. Based on the testimony, changes to the proposed rules are being considered by the Real Estate Commission.

The proposed rules would amend the Real Estate Commission's rules by adopting a new subchapter relating to collection by condominium associations of replacement reserves for future major repairs.

For further information, call 586-2646.

Registration Required by January 1, 1995

Condominium associations with six or more apartments, condominium managing agents, and condominium hotel operators are reminded that state law requires them to register each year with the Real Estate Commission.

Registration forms together with instructions for completing them were mailed to those previously registered with the Real Estate Commission. Unregistered condominium associations, condominium managing agents, and condominium hotel operators may request forms and instructions by telephoning 586-2644 (or from the Neighbor Islands, 1-800-468-4644, extension 6-2644).

Section 514A-95.1, Hawaii Revised Statutes, requires that all condominium

associations with six or more apartments register with the Real Estate Commission. The section further provides in pertinent part that: "...Any association which fails to register as required by this section or whose registration is rejected or terminated shall not have standing to maintain any action or proceeding in the courts of this State until it registers...."

This means that an unregistered association does not have standing to file any lawsuit in any state court, for example, against an owner to comply with the bylaws or to pay delinquent maintenance fees. In addition, an unregistered association may be subject to imposition of a late registration fee or a fine of \$10,000 or less.

Condominium Managing Agent and Condominium Hotel Operator Registration

All registrations as condominium hotel operators and condominium managing agents expire on December 31, 1994. Any registrant who does

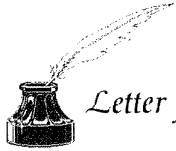
not successfully renew their registration by that date must cease operations or be subject to disciplinary action. For condominium managing agents,

this includes possible conviction of a misdemeanor, imprisonment for one year or less, a fine of \$10,000 or less, and a civil penalty of \$10,000 or less. For condominium hotel operators, disciplinary sanctions include a civil penalty of up to \$1,000 for each violation or a fine of \$25 multiplied by the aggregate number of apartments utilized as a condominium hotel. Each month or fraction of a month of non-compliance shall be deemed a new and separate violation.

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Letter from the Chair. . .

Dear Condominium Owners,

This past spring, the Legislature passed only one bill amending Chapter 514A, the condominium property regime statute. That bill was signed by Governor Waiffee in June and became Act 77.

The statutory change encourages directors to learn more about association governance at association expense by purchasing educational materials or attending seminars.

As a part of §514A-82(b), this amendment applies to all condominium associations.

To facilitate attendance at seminars, the Hawaii Condominium Bulletin has included an educational events calendar.

Due to requests for additional copies of the bulletin, each registered association will be sent 11 copies of each issue. If a bulletin board is available, we recommend that a copy be posted. In addition, as we have strongly recommended in the past, a copy or copies should be placed in a three-ring binder and be part of the association of apartment owners library of reference materials for any apartment owner or future director to review.

If you have questions, comments, or suggestions, please feel free to write to or call (586-2646 or from the Neighbor Islands, 1-800-468-4644, extension 6-2646) the Commission's condominium specialists.

Very truly yours,

*Carol Mon Lee,
Chair, Condominium and
Cooperative Review Committee*

(Editor's note: Careful readers have doubtless observed that Commissioner Lee is now chair. Commissioner Michael Ching of Kauai now serves as vice-chair.)

Ask the Condominium Specialists

Q. One of my association's officers also works as an independent contractor for the managing agent retained by the association. Is this permitted by Chapter 514A?

A. Section 514A-82(b)(7) states that "An owner shall not act as an officer of an association and an employee of the managing agent employed by the association." Thus, if a person is not an employee of a managing agent, then he or she may be eligible to serve as an officer of an association served by that managing agent.

However, distinguishing an independent contractor from an employee is often rigorous and complex. Moreover, if the officer is also a director, section 514A-82.4 provides he or she owes a fiduciary duty to the association.

Q. Now that section 514A-96 no longer permits associations of twenty owners or more to waive the audit, and requires associations to be audited by a 'public accountant.' Who can be authorized to perform the audit?

A. When section 514A-96 was adopted in 1985 (Act 212), it provided for a cash verification and a yearly audit by a "certified public accountant." In 1986, by Act 96, the word "certified" was deleted so as to permit "public accountants" as well as "certified public accountants" to perform the audit.

Public accountants must be registered and certified public accountants must be licensed, as required by the public accountancy law, Chapter 466, Hawaii Revised Statutes.

The public accountancy law, Chapter 466, Hawaii Revised Statutes requires that public accountants be registered and certified public accountants be licensed.

If you have questions, please contact the Board of Public Accountancy, 1010 Richard Street, Honolulu, Hawaii 96813.

Finally, managing agents, as real estate licensees, should always be wary of utilizing or recommending an unlicensed person.

PROXIES

On occasion, a condominium owner finds that he or she cannot attend an association meeting. Nevertheless, the owner may still desire to participate in determining the outcome of any issues requiring the vote of owners. Thus, on these occasions, subject to certain conditions, an owner may designate any person to vote on those issues on the owner's behalf. The designation is usually made by the owner giving a "proxy" to that person. At minimum, the giving of a proxy must comply with the requirements and procedures set forth in sections 514A-82(b)(4) and 514A-83.2, Hawaii Revised Statutes. This reference file provides a condominium owner with some information for the valid execution of proxies.

The Nature and Role of Proxies

Condominium owners elect directors to manage and govern the affairs of the association on their behalf. In Hawaii, a good number of owners elect board members and vote on association issues by proxy.¹ *"A proxy is the written authorization by an owner(s) that appoints another person to represent and vote on behalf of such owner(s)."*² Not all states allow voting by proxy. Hawaii's condominium law³ does.

Proxies are commonly used in corporate elections, where a corporate shareholder appoints someone to act as their agent (on their behalf) in voting their shares of stock. When applied to condominium associations, the apartment owner's granting of a proxy may be said to create an agency whereby a person or the board votes an owner's percentage of an undivided interest in the management and governance of the common elements.

Hawaii's condominium law, Chapter 514A, Hawaii Revised Statutes, requires that a proxy be

valid only for the meeting for which it is given and to any adjournments of that meeting.

Types of Proxies

General and Directed Proxies. There are two common types of proxies, "general" and "directed." A general proxy authorizes the holder, at an annual or special meeting, to vote on all items on the agenda and on any other business matters before the board. See Appendix 12 of the *Board of Directors' Guide to Proxies* (June 1994) for sample forms. In contrast, a directed proxy directs and authorizes the proxy holder to vote in a certain manner and in accordance with the express terms of the proxy. See Appendix 13 of the *Board of Directors' Guide to Proxies* (June 1994). The giving of a general proxy requires an owner to have trust in the holder's decision making abilities. Thus, in giving a general proxy, a condominium owner should take steps to ensure that the proxy holder's positions on the various agenda items are consistent with the owner's intentions and desires.

Sometimes a condominium board requests that an owner appoint the board as the owner's proxy and allow the board to vote on all matters coming before the meeting. A condominium owner may honor the request or the owner may elect to limit the proxy to certain items. In so limiting the proxy, the owner has directed the proxy. See Appendix 8a of the *Board of Directors' Guide to Proxies* (June 1994).

Minimum Requirements for a Valid Proxy

Whether a condominium owner is executing a general or a directed proxy, there are minimum requirements an owner must follow for its valid

execution. Part V of the Hawaii condominium law lists these minimum requirements. Section 514A-83.2 of the Hawaii condominium law, in particular, details the standards. This section describes: the conditions for giving a valid proxy; the duration of a proxy; the permitted scope of the proxy; who may be proxy holders; when the board of directors may be the proxy holder and the procedure an owner may use to indicate how the proxy vote should be used by board members; prohibitions against the use of association funds for soliciting proxies by a board of director's officer (except an officer may use association funds to solicit proxies as an owner⁴); and the revocation of proxies.

In general, in order to be valid, a proxy must:

- be delivered either to the secretary of the association or the managing agent no later than 4:30 p.m. on the second business day prior to the date of the meeting to which it pertains;⁵ and contain at least the:
 - ◆ name of the association of apartment owners,
 - ◆ date of the meeting of the association of apartment owners;
 - ◆ printed name and signature of the person or persons giving the proxy;
 - ◆ number of the apartment or apartments for which the proxy is given;
 - ◆ printed name of the person or entity to whom the proxy is given; and
 - ◆ date that the proxy is given. (see Appendix A of the *Board of Directors' Guide to Proxies* (June 1994) for sample proxies).

In addition to these general requirements, *for the valid execution of a proxy*, a condominium owner must meet other *additional requirements*. These additional requirements vary depending who the owner designates as the proxy holder, the purpose of the proxy, whether the proxy was solic-

ited, and by whom. See *Board of Directors' Guide to Proxies* (June 1994) for a further explanation of these additional requirements.

Additional Requirements and Proxy Holders

Subject to certain conditions, the law allows giving a proxy to any person. Owners may designate other condominium owners, resident managers, managing agents, board members, board of directors, officers of the board, and any other individual or entity as proxy holders. These designations, however, must comply with the general requirements and procedures set forth in sections 514A-82(b)(4) and 514A-83.2, Hawaii Revised Statutes. See Appendix B of the *Board of Directors' Guide to Proxies* (June 1994)

The Board of Directors as the Proxy Holder—General Requirements.

When an owner designates the proxy holder as the board of directors as a whole, the owner must follow the general procedures set forth in section 514A-83.2 (c) of the Hawaii condominium law. This section requires the owner to:

- mark or check the box required to be on the proxy form, thereby indicating that the owner wishes the vote to be shared with each board member receiving an equal percentage. If the owner does not mark the box, then the owner's vote will be voted on the basis of the preference of the majority of the board.

Apparently, the box procedure forces an owner to act when the owner wishes to disagree with the majority preference of the board. Inaction allows the continuation of the status quo of majority preference; thereby, continuing the presumed support for the majority of the elected board.

Proxy Holders for the Election of Board Directors

- 1) *Board members.* When a board member uses association funds to solicit or request that an owner give a proxy to the board member and the proxy is for the election or reelection of board directors, the requirements set forth in section 514A-82(b)(4), of the Hawaii condominium law, must be satisfied. A board member who uses association funds to solicit proxies is prohibited from casting the proxy votes received/collected for the election or reelection of board members unless:⁶
 - the proxy form specifically authorizes the board member to vote for the election or reelection of the board directors; and
 - the board first posts notice of its intent to solicit proxies in prominent locations within the project at least 30 days prior to proxy solicitation.
- 2) *Owners as Proxy Holders.* Owners may request proxies from other owners. Section 514A-82(b)(4) of the Hawaii condominium law also sets forth procedures to be followed when the board intends to solicit proxies for the election of board directors. The section requires the board to post notice in prominent locations throughout the project that the board intends to solicit proxies for the election or reelection of board directors. Within seven days of the board's posting the notice of intent to solicit proxies, an owner may make a request to participate in the association's solicitation. The board must then mail to all owners, either:
 - a proxy form containing the names of all owners who have requested the use of association funds for soliciting proxies, accompanied by statements submitted by the owners, not to exceed 100 words, indicating the owners' qualifications to serve on the board and reasons for wanting to receive proxies; or
 - a proxy form, containing no names but, accompanied by a list of names of all owners who have requested the use of association funds for soliciting proxies and their statements.⁷
- 3) *Resident managers and managing agents.* Among other provisions, Section 514A-82(b)(4), of the Hawaii condominium law, specifically prohibits resident managers and managing agents from soliciting any proxies from condominium owners in associations which employ or hire them. Should the managers or managing agents receive any proxies, they may not vote the proxies for any purpose except to establish a quorum. Thus, for example, a manager or managing agent cannot cast a proxy vote for the election or reelection of board members.
- (4) *Officers of the board.* Section 514A-83.2(d) of the Hawaii condominium law also provides limitations and conditions on the use of proxies by officers of the board. Officers of the board may be proxy holders, but cannot use association funds to solicit proxies. However, the Hawaii condominium law⁸ does not prevent a board officer from participating as an owner in the association's solicitation.

Successor Proxy Holders. Sometimes, for whatever reason, a designated proxy holder is unable to attend the meeting for which the holder is given a

proxy. The Hawaii condominium law appears to make no specific provision for this situation. Condominium owners should review their association's bylaws for a procedure to follow in this situation. The bylaws may include but are not be limited to: giving the board authority to declare the proxy invalid, designating the use for quorum purposes only; or having the proxy automatically vest in the board of directors as the successor proxy holder with the proxy voted with the preference of the majority. See Appendix 11 of the *Board of Directors' Guide to Proxies* (June 1994).

A Condominium Owner May Use Association Funds to Solicit Proxies for Election to the Board of Directors

Sometimes there is a campaign to amass the

required number of votes to control the outcome of an election. The costs associated with such a campaign can be expensive and often cannot be borne easily by an owner. The Hawaii condominium law provides owners with equal opportunity to participate in the association's solicitation. These access provisions have been specified at page 5 of this article.

For More Information on Proxies

For additional information about proxies and sample forms see the *Board of Directors' Guide to Proxies* (June 1994). A copy has been mailed out to registered condominium associations with this issue of the Hawaii Condominium Bulletin addressed to the association's president or designated contact person.

Bibliography

- ¹ *Report to the Legislature Relating to Condominium Property Regime*. 1990. 43.
- ² Nagle, P. Michael, CAI-GAP Report 21 *Guide to Annual Meetings, Special Meetings, and Elections*. Alexandria, Virginia: Community Associations Institute, 1992, 13. This publication, a part of the Condominium Reference Library, is one among the many reference publications available for use at your local Hawaii State Library. Please call your library branch to confirm availability.
- ³ Sections 514A-82(b)(4), 83.2, Hawaii Revised Statutes.
- ⁴ Section 514A-83.2(d), Hawaii Revised Statutes.
- ⁵ **Practical Issue:** Counting of days. Throughout Part V, "Condominium Management," Chapter 514A, Hawaii Revised Statutes, references are made to required number of days for performing an act. Thus within the usual context, "delivery of the proxy no later than 4:30 p.m. of the second business day prior to the date of the meeting" means that the secretary or managing agent will have less than 48 hours if the meeting is held in the morning or afternoon and more than 48 hours if held in the evening.
- ⁶ Section 514A-82(b)(4), Hawaii Revised Statutes.
- ⁷ Section 514A-82(b)(4), Hawaii Revised Statutes.
- ⁸ Section 514A-83.2(d), Hawaii Revised Statutes.

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Purchased or funded by Condominium Management Education Fund, Real Estate Commission, State of Hawaii..

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Associations or owners who transact business with unregistered condominium hotel operators or unregistered managing agents may be denied access to the Real Estate Recovery Fund. This Fund sometimes provides restitution for financial losses resulting from misconduct by real estate licensees. In addition, complaints filed against

unregistered condominium managing agents or unregistered condominium hotel operators are less likely to be resolved to the satisfaction of the complainant, especially as to restitution. This is because enforcement often focuses on the failure to register rather than on any misconduct by the unregistered party.

New Fees for Condominium Managing Agents and Condominium Hotel Operators

Effective July 18, 1994, the following fees are in effect:

	Application Fee (Non-Refundable)	Registration Fee
Condominium Managing Agents	\$50.00	\$85.00 (includes \$35 fee for Compliance Resolution Fund)
Condominium Hotel Operator:	\$50.00	\$95.00 (includes \$45 fee for Compliance Resolution Fund)

1994 Legislative Update

*The discussion of selected 1994 Acts in this section of the **Hawaii Condominium Bulletin** is not and should not be construed as legal advice. Because this article summarizes only some of the changes made by the 1994 Acts, readers are advised to obtain and read the full text of the Acts. They are also advised to seek the services of competent professionals should they need answers as to how the new law may apply to their particular circumstance.*

During its 1994 session, the Hawaii Legislature passed only one bill amending Chapter 514A, the condominium statute

The statutory change encourages directors to learn more about their du-

continued on next page

Condominium and Cooperative Review Committee Holds Hilo Meetings

On Wednesday, November 16, 1994, at 9 o'clock a.m., the Real Estate Commission's Condominium and Cooperative Review Committee met in Hilo at the Naniloa Hotel's Sandalwood II meeting room.

Members of the condominium community were invited to attend and participate at the public meeting. Members of the Real Estate Commission, the Commission's staff, and the staff of the

Hawaii Real Estate Research and Education Center were present. The meeting had a set agenda and an open forum.

The Real Estate Commission:

Conducts a variety of real estate related education and research activities including support for the Hawaii Real Estate Research and Education Center at the University of Hawaii at Manoa

- Is involved in condominium governance issues
- Licenses and regulates the conduct of real estate brokers and salespersons
- Registers condominium hotel operators, condominium managing agents, and condominium associations
- Is involved in condominium public reports

Do you have a condominium problem? Mediation may be the solution.

To support the condominium statute's provisions for owner enforcement and association self-governance, the Real Estate Commission sponsors a mediation program to bring disputing parties together to discuss their condominium problems. The program is operated through the Neighborhood Justice Center and through Mediation Services of Maui. Specially selected mediators assist the parties in communicating about the issues, exploring possible solutions, and negotiating mutually acceptable settlements. Mediators do not impose solutions on parties to a dispute but try to help them reach their own solutions. If necessary, mediation services are provided on the Neighbor Islands.

On Maui contact
Mediation Services of Maui, Inc.
Cameron Center, 95 Mahalani St
Wailuku, Maui. Phone: 244-5744.

For all other islands contact:
Neighborhood Justice Center
200 North Vineyard Boulevard, Suite 320
Honolulu, Hawaii Phone: 521-6767

For further information, call the Commission at 586-2646 (Toll free from the neighbor islands only: 1-800-468-4644, ask for extension 62646).

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ties at association expense by purchasing education materials or attending seminars. All association members will benefit from board members who received training about their duties and responsibilities.

In particular, the amendment allows directors to expend condominium association funds, subject to the following provisions:

- 1) the funds are not to be deemed to be compensation to the directors;

- 2) the expenses are for training and education in topics directly related to the duties and responsibilities of directors;
- 3) the expenses are subject to disclosure as line items in the association's annual operating budget;
- 4) the expenses may include seminar or conference registration fees, and education materials such as books, videos, tapes;

- 5) expenses may include economy travel within the state of Hawaii

Since this change will be codified as §514A-82(b)(12), this amendment applies to all condominium associations. (HB 2460-94, HD 1, SD 1, SSCR 2732, HSCR 692-94, Act 77, Effective June 7, 1994)

[Summaries are excerpted or adapted from Digest of Bills Passed by the Seventeenth Legislature, Regular Session of 1994, Legislative Reference Bureau.]

Education Calendar

This listing reports the availability of some condominium governance related events. The Hawaii Real Estate Commission and the Hawaii Real Estate Research and Education Center **express no opinion** about the quality or content of any event which they do not sponsor; neither should the listing be construed as an endorsement or sponsorship of any event by the Hawaii Real Estate Commission or the Hawaii Real Estate Research and Education Center, unless expressly indicated. Interested parties are advised to conduct their own investigation and formulate their own opinion about these matters. Participants are advised that courses are subject to change, please check directly with the provider about the specifics of a particular event.

Date	Time	Course Title	Location	Provider
12/3/94	8:30 - 4:30	ABC's — A Basic Course for Association Leaders	Japanese Cultural Center Oahu	CAI
1/11/95		Annual Meetings Luncheon Workshop	To Be Determined	CAI
1/12/95	11:30-1:30	Membership Meeting Speaker(s): TBA Luncheon Cost: \$16.00	Hale Koa Hotel, Oahu	HCAAO

For full information on the above-listed courses, please call the provider

Provider	Phone	Address
CAI — Community Associations Institute Hawaii Chapter	531-6836 (Oahu)	P.O. Box 976, Honolulu, HI 96808
HCAAO — Hawaii Council of Associations of Apartment Owners	533-2528 (Oahu)	677 Ala Moana Blvd., Suite 701, Honolulu, HI 96813
HREREC — Hawaii Real Estate Research & Education Center	956-7892 (Oahu)	2404 Maile Way B-201, Honolulu, HI 96822
IREM — Institute of Real Estate Management Hawaii Chapter No. 34	737-4000 (Oahu)	1136 12th Ave., Suite 220, Honolulu, HI 96816
SMCC — South Maui Condominium Council	879-2758 (Maui)	P.O. Box 647, Kihei, HI 96753
UH-SBMP— Small Business Management Program University of Hawaii	956-7363 (Oahu)	2404 Maile Way, Room A-202, Honolulu, HI 96822

This material can be made available for individuals with special needs. Please call the Senior Condominium Specialist at 586-2644 to submit your request.